No. 85-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE, REAL PARTIES IN INTEREST)

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF GOVERNMENT OF SWITZERLAND AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Government of Switzerland will address the following questions:

Whether the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is applicable to the discovery of evidence located abroad from a party over whom a U.S. court has personal jurisdiction; and

Whether a U.S. court acts in conformity with international law if it unilaterally compels production of evidence located in a member State of the Convention in violation of that State's sovereignty.

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Pursuant to Rule 36 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as *amicus curiae* to urge reversal of the judgment below. Both petitioners and respondent have consented to the submission of this brief, and the written consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Switzerland is a member of the Hague Conference on Private International Law and actively participated in the negotiation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Convention"). The Government of Switzerland signed the Convention on May 21, 1985, and is now in the process of seeking ratification by the Swiss Parliament.[1] Although the Government of Switzerland has no direct interest in the outcome of this litigation, it believes that the decision of the Court in this case will have a significant effect on the application of the Convention in future cases, some which may involve the collection of evidence from Switzerland. The disposition of this case may influence the decision of the Swiss Parliament on whether to ratify the Convention.

The Government of Switzerland believes that the decision of the Court of Appeals must be reversed to prevent violations of international law and intrusions into the sovereignty of foreign nations, as well as to preserve the Convention as an essential link between the common law and civil law countries. This brief sets forth the views of the Government of Switzerland on the potential effects of this case on the legal interaction between Switzerland and the United States.

SUMMARY OF ARGUMENT

As the economies of nations have become more interdependent, effective mechanisms for cooperation between their different legal systems have become increasingly important. These mechanisms for cooperation (including

[1] Until the Convention is ratified by the Swiss Parliament, Switzerland is continuing its practice of providing evidence for use in civil proceedings in the United States through letters rogatory.

treaties, statutes, and administrative arrangements) facilitate international business by enhancing the predictability and enforceability of rules governing transactions across international boundaries.

Transnational enforcement of legal rules can most effectively be achieved when the sovereignty of all nations is respected. Such respect requires that conflicts between the legal requirements of nations be avoided or minimized whenever possible.

Pre-trial discovery is one area in which intergovernmental cooperation is necessary. In Switzerland, as in many civil law countries, the collection of evidence for use in civil proceedings is regarded as the exclusive function of the domestic judiciary. Because common law countries, such as the United States, permit the taking of evidence without participation of the judiciary, use of the Convention is especially important when a U.S. litigant seeks evidence from a civil law country. If a U.S. court unilaterally attempts to coerce the production of evidence located in Switzerland, without requesting governmental assistance, the U.S. court intrudes upon the judicial sovereignty of Switzerland. Use of the Convention will satisfy the requirements of both nations by providing the needed evidence to the U.S. litigant through a procedure consistent with Swiss law and sovereignty.

Contrary to the opinion of the lower court, the Convention plainly applies to the discovery of all evidence located in a contracting state, even if a U.S. court has personal jurisdiction over the party from whom the evidence is sought. To conclude otherwise would deprive the Convention of one of its essential purposes. Furthermore, the lower court's theory that discovery takes place only in the country requesting the evidence, and not at all in the country where the evidence is located, is irreconcilable with the concept of territorial jurisdiction and has no basis in international law.

The United States is a party to the Convention, which is a valid treaty, and is required by international law to comply with its terms. U.S. litigants and courts should not be given the option of ignoring the Convention in their own discretion. Rather, use of the Convention should be mandated in all cases in which evidence is sought from abroad.

ARGUMENT

THE COURT SHOULD REQUIRE USE OF THE HAGUE EVIDENCE CONVENTION TO OBTAIN EVIDENCE FROM ABROAD

A. The Convention, Like Other Judicial Assistance Mechanisms, Serves an Important Role in Facilitating International Commerce

Specifically, this case involves the use of U.S. discovery rules, rather than the Convention, to collect evidence in France for use in a U.S. civil proceeding, and the effect of such a procedure upon French sovereignty. The Government of Switzerland believes, however, that the Court's decision will have far-reaching effects on the use of the Convention to obtain evidence from other countries, including Switzerland, and also on other mechanisms for judicial assistance, such as those used for the collection of evidence in criminal investigations. Therefore, the Government of Switzerland submits that the Court should view the Convention in the broader context of international judicial assistance and the function such assistance serves in the international community.

In recent years, the economies of nations have become increasingly interdependent. More often than ever before, the viability of the plans of the government and business sectors in one nation depends upon the availability of rational and predictable legal rules and procedures in other nations.

Consequently, the existence of effective mechanisms for judicial assistance across national boundaries has important benefits for all countries. These mechanisms facilitate the execution of contracts, the enforcement of judgments, the implementation of regulatory systems, and the prevention and punishment of crimes. Without these international mechanisms, the commercial and social goals of many nations, including the United States and Switzerland, would suffer greatly.

The important role served by judicial assistance mechanisms in permitting differing national legal systems to coexist in an interdependent world is well illustrated by the relationship between Switzerland and the United States. On occasion, in the tremendous volume of business transactions between the two countries, situations arise in which there is confusion over which country should regulate certain activities. In these situations, both nations can justifiably assert jurisdiction over the same persons and conduct.

Nonetheless, Switzerland and the United States have a long and successful history of cooperation in resolving legal disputes. This pattern of friendly cooperation has produced significant benefits in such areas as crime control [2]

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[2] In 1973, the United States and Switzerland entered into the Treaty on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. No. 8302. This Treaty, which entered into force in 1977, allows authorities of each nation, by making a written request on the other, to obtain documents, information, and other assistance in investigating a wide variety of crimes. The Treaty, when applicable, overrides Swiss laws that would otherwise prohibit disclosure of information to foreign parties. Since the Treaty came into effect, the Government of Switzerland has granted virtually all of the hundreds of requests made by the United States. The Treaty, which for the United States was the first of its kind, has served as a model for subsequent U.S. treaties on judicial assistance with other countries. *See* Senate Comm. on Foreign Relations, Treaty on Mutual Assistance with the Kingdom of the Netherlands, S. Exec. Rep. No. 36, 97th Cong., 1st Sess. 2 (1981); *cf.* Treaty Between

and securities law,[3] as well as the collection of evidence for use in civil cases.[4] The Government of Switzerland

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the United States and Canada on Mutual Legal Assistance in Criminal Matters, March 18, 1985 (not yet entered into force).

In 1981, Switzerland enacted the Federal Act on International Mutual Assistance in Criminal Matters ("IMAC"), *translation reprinted in* Am. Bar Ass'n Nat'l Inst., Transnational Litigation: Practical Approaches to Conflicts and Accommodations 492-532 (1984) ("Transnational Litigation"). Under this domestic law, all foreign governments, including the United States, can request assistance in various matters relating to law enforcement. For example, IMAC includes provisions under which the Government of Switzerland may provide foreign governments with documents held by persons within Switzerland. Like the Treaty, IMAC takes precedence over Swiss privacy laws. IMAC, in addition, covers certain areas of investigation not covered by the Treaty. *See generally* Frei, "Swiss Secrecy Laws And Obtaining Evidence from Switzerland" in Transnational Litigation at 1-38.

[3] In the early 1980s, problems arose in connection with investigations of securities law violations by the U.S. Securities and Exchange Commission ("SEC") because "insider trading, as such, is not a crime in Switzerland and therefore not covered by the Treaty. Discussions between the governments led to the creation of the Memorandum of Understanding Between Switzerland and the United States to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, *reprinted in* 22 Int'l Legal Materials 1-7 (1983), which operates in conjunction with a private convention among Swiss banks, Agreement XVI of the Swiss Bankers' Association, *reprinted in* 22 Int'l Legal Materials 7-12 (1983). Under this arrangement, which was concluded in 1982, a combination of governmental and banking industry procedures enable the SEC to obtain information about transactions involving possible insider trading through Swiss banks. This arrangement is viewed as a temporary measure that will become obsolete when the Swiss Parliament enacts new legislation that will have the effect of making pertinent information available under the Treaty. *See* Frei, *supra* note 2, at 23-25.

[4] Under current Swiss law, parties seeking evidence located within Switzerland for use in civil proceedings must request that evidence through use of the letters rogatory procedure. The Government of Switzerland has been extremely liberal in granting assistance in

views its signing of the Convention as but the latest in this series of efforts to provide a reliable legal framework for the conduct and regulation of transnational business.

In general, in approaching problems arising out of conflicts of jurisdiction, the Government of Switzerland proceeds on the following principles: (1) that a means should be found for achieving enforcement of reasonable legal rules across international boundaries, (2) that the sovereignty of nations should be recognized and protected, (3) that conflicts between the legal requirements of nations should be avoided whenever possible, and minimized when they cannot be avoided, and (4) that intergovernmental channels of assistance should be employed to the greatest extent possible to avoid such disputes. When civil litigants in the United States need evidence from other member states of the Convention, the Convention constitutes the intergovernmental channel of assistance that will provide the needed evidence while avoiding a conflict of jurisdiction.

Unfortunately, the Court of Appeals in this case has chosen a course of action that maximizes, rather than minimizes, conflicts between national legal systems. In ruling that the Convention is inapplicable when a U.S. court has jurisdiction over a litigant, even though the needed evidence is located exclusively in a foreign country, the lower court has revoked the commitments of the United States under the Convention and violated international law. The Government of Switzerland believes that this ruling does not benefit the long-term interests of the United States and the international community.

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such cases; in recent years, about twenty requests per year have been received from the United States, and all have been executed. The Government of Switzerland expects to continue this liberal policy after Switzerland joins the Convention.

B. An Attempt by a U.S. Court to Compel Unilaterally the Taking of Evidence in Switzerland, Similar to the Demand for Evidence from France Made in This Case, Would Violate Swiss Sovereignty

If the decision of the lower court is upheld, it is likely that in future cases U.S. litigants seeking evidence located in Switzerland will ignore intergovernmental channels of assistance, such as letters rogatory and the Convention, and will rely instead on the domestic discovery procedures in the Federal Rules of Civil Procedure. In that event, the incidence of destructive—and unnecessary—conflicts of jurisdiction between Switzerland and the United States is likely to increase significantly.

Switzerland, as many other civil law countries, exercises more control over the collection of evidence for use in court proceedings than does the United States. Switzerland subscribes to the typical civil law view that the taking of evidence is essentially a domestic judicial function; when evidence is taken by a foreign authority without the participation or consent of the host country, the sovereignty of the host country is considered to have been violated. *See* Report of the United States Delegation to Eleventh Session of the Hague Conference on Private International Law, *reprinted in* 8 Int'l Legal Materials 785, 806 (1969); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646, 647 (1964).

Under this fundamental principle of the civil law, which derives from the doctrine of territorial jurisdiction in international law, only the state in which the requested evidence is located has the authority to enforce and execute the gathering of that evidence. If a U.S. court orders a party to produce evidence from Switzerland, and backs that order with its coercive powers, the U.S. court, in effect, substitutes its own authority for that of the competent Swiss court, and therefore violates Swiss sovereignty and international law.

This violation of sovereignty is compounded when, as is sometimes the case, Swiss law specifically prohibits release of the information.[5] In that situation, the U.S. court not only substitutes its own authority for that of the Swiss judicial system, but also compels the litigant to violate Swiss law.

Judicial sovereignty is not a vague or theoretical concept in Switzerland. For many years, the Swiss Penal Code has made it a crime for any person to take evidence on Swiss territory for use in foreign court proceedings.[6] This law has been enforced against American attorneys who came to Switzerland to gather information for trial.[7]

In addition, on occasion the Government of Switzerland has been required to take special measures to protect its judicial sovereignty. For example, in 1983, a Swiss corporation under investigation for alleged tax fraud was served with a U.S. subpoena requiring production of documents located in Switzerland. Although an intergovernmental channel of assistance was available for obtaining

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[5] For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing confidential business information relating to third parties within Switzerland to foreign governments.

[6] The relevant provision, Article 271, provides as follows in translation:

> "Acting without Authorization for a Foreign State."
>
> "1. Anyone who, without authorization, takes in Switzerland for a foreign state any action which is within the powers of the public authorities,
>
> "Anyone who takes such actions for a foreign party or for any other foreign organization,
>
> "Anyone who facilitates such actions,
>
> "Shall be punished with imprisonment, in serious cases with penitentiary confinement."

[7] *See* Frei, *supra* note 2, at 14-15.

the documents through the Government of Switzerland,[8] the U.S. Government prosecutors insisted on using unilateral coercion.[9] When the Swiss corporation indicated it would comply with the subpoena,[10] the Government of Switzerland confiscated the documents, which it held until the U.S. prosecutors requested the documents through the available intergovernmental mechanism. All of the documents were then released to the U.S. authorities.

The above examples are isolated instances of conflict in an otherwise cordial and fruitful relationship. They serve to illustrate, however, that Switzerland, like the United States, has legal procedures which cannot be altered or suspended on an ad hoc basis. The Government of Switzerland, as well as those within its borders, may act only in accordance with Swiss law and through procedures consistent with that law.

Swiss judicial sovereignty, and the laws that protect it, should not be viewed as "blocking statutes" designed to frustrate United States discovery procedures.[11] Rather, they are a reflection of a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens.

The Government of Switzerland subscribes to the original intent of the negotiators of the Convention—an intent shared by the United States negotiators—that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable'

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[8] The documents were available to the U.S. Government under the Swiss Federal Act on International Mutual Assistance in Criminal Matters. *See* note 2 *supra.*

[9] *See Marc Rich & Co., A.G.* v. *United States*, 736 F.2d 864 (2d Cir. 1984).

[10] The court had imposed a penalty of $50,000 per day on the company to coerce compliance. *Id.*

[11] Articles 271 and 273 of the Swiss Penal Code, discussed in notes 4 and 5 *supra*, were enacted in 1937.

in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." Message of the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. A, 92d Cong., 2d Sess. 11 (1972). If evidence is requested through the intergovernmental procedures of the Convention, the procedure is "tolerable" in Switzerland because the evidence will be collected under the auspices of the Swiss judiciary. Consequently, in situations where the Convention is applicable to evidence in Switzerland, its use will benefit U.S. interests by providing the needed evidence, and protect Swiss interests by avoiding intrusions upon Swiss sovereignty.

In this regard, the Government of Switzerland affirms its intent to construe the provisions of the Convention liberally in providing judicial assistance to the United States and the other member nations of the Convention.

C. The Convention Applies to the Production of Evidence by Parties Subject to U.S. Jurisdiction

The Court of Appeals has held that the Convention does not apply at all to the production of evidence abroad by a litigant when a U.S. court has personal jurisdiction over the litigant. This holding was not limited to discovery of evidence in France, but rather will be applied to the collection of evidence from all countries, including Switzerland, if not reversed by this Court. In the view of the Government of Switzerland, the interpretation by the lower court of the Convention is completely contrary to its plain meaning and intent, as there is no suggestion in the Convention itself, or its history, that the contracting states intended the Convention to apply only to situations in which the state requesting assistance lacks personal jurisdiction.

Indeed, as discussed above, the main purpose of the Convention is to provide a bridge between national legal

systems that permits the production of needed evidence while eliminating intrusions of sovereignty. A violation of Swiss sovereignty is in no way mitigated when a U.S. court has personal jurisdiction over the party coerced to take actions within Switzerland. Therefore, in holding that the Convention does not apply when a U.S. court has personal jurisdiction, the Court of Appeals has deprived the Convention of one of its essential functions.

In addition, the Government of Switzerland rejects the assertion of the Court of Appeals that, when a party is ordered to produce evidence from abroad, the discovery takes place only in the United States, and not in the nation where the evidence is located. This approach is apparently based on a theory that jurisdiction over evidence is determined not by the location of the evidence, but rather by the existence of personal jurisdiction over the party who has physical control over the evidence.

It cannot be disputed, however, that when evidence is sought from a foreign country for use in the United States, activities within the foreign country will be required to prepare the evidence for transmission. Documents may need to be reviewed and photocopied, persons interviewed, and written responses prepared, all within the country where the evidence is sought. Therefore, the assertion of the lower court that France, and by implication other countries, has no interest in activities within its borders preparatory to production of evidence in the United States is irreconcilable with the principle of territorial jurisdiction. This Court has stated that

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restrictions upon it, deriving validity from an external source, would imply a diminuation of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in

> that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself."

The Schooner Exchange v. *McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812). Absent use of the Convention, the United States lacks "the consent of the nation itself" to compel activities within that nation.

In particular, the lower court's theory is contradicted by the text of the Convention. Reflecting the right of member states to control the manner in which evidence within their territory is gathered, Article 11 of the Convention provides as follows:

> "In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—
>
> "(a) under the law of the State of execution; or
>
> "(b) under the law of the State of origin . . . ."

If the drafters of the Convention had intended that the production of evidence located in a foreign country be construed as taking place in the country requesting assistance, they would not have contemplated, as in Article 11, a refusal to give evidence "under the law of the State of execution"—that is, the country in which the evidence is located.

D. The United States Should Not Disregard Its Obligations Under International Law

The decision of the Court of Appeals, in rejecting the applicability of the Convention to the vast majority of cases it was intended to encompass, has effectively abrogated the duties of the United States not only to France, but to all countries that are members of the Convention. Under the fundamental rule of *pacta sunt servanda*, the

United States, including its courts, is required to follow the procedures of the Convention. To do otherwise is to breach the obligations of the United States as a nation, and risk endangering the viability of the Convention as a whole. A decision to violate the Convention should not be made without full consideration of the long-term effects on the international legal system, whose stability benefits the United States, as well as Switzerland and many other countries.

CONCLUSION

Although this case involves the collection of evidence from France, its resolution will affect use of the Convention to obtain evidence in other countries, including Switzerland. A failure by a U.S. court to use the Convention when it is applicable contradicts the obligations assumed by the United States under international law when it entered into the Convention. Accordingly, the Government of Switzerland respectfully urges the Court to vacate the judgment of the Court of Appeals and to remand the case with instructions mandating use of the Convention.

Respectfully submitted,

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